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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DANIEL SULLIVAN,
Petitioner

v.

ROBERT ROBINSON, TRUSTEE IN BANKRUPTCY
OF D. C. SULLIVAN & CO., INC.
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

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THE WRIT SHOULD BE DENIED BECAUSE THE LOWER COURT PROPERLY REFUSED TO OVERTURN THE ASSUMPTION OF PENDENT JURISDICTION OF A STATE CLAIM ALREADY DETERMINED ON THE MERITS ALONG WITH RELATED SUBSTANTIAL BANKRUPTCY CLAIMS COMMITTED TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURT.

The four "Reasons for the Writ" submitted by Daniel Sullivan in his petition are all inter-related, and amount to an argument that in this bankruptcy action the district court's exercise of pendent jurisdiction over the state law claim that the petitioner had breached his fiduciary duties, was improper and in contravention of Article III provisions governing the exercise of jurisdiction by federal courts. The lower court, in denying Sullivan's petition for rehearing on this argument, had little difficulty holding that "[t]he district court properly assumed jurisdiction of the pendent state claim." (Petitioner's Supplementary Appendix at 109). The court found the basis for that ruling in the well-established principles of United

Mine Workers v. Gibbs, 383 U.S. 715 (1966). Because the Gibbs principles are applicable, particularly in light of the stage of the proceedings in this bankruptcy litigation, the lower court's decision was proper and should not be disturbed.

In a Pre-trial Order issued early in this litigation, the District Court made the following determination regarding its jurisdiction to hear the Trustee's claims:

"Jurisdiction is vested in this court by virtue of plaintiff's claim that it has stated a cause of action under Section 67(d) and 67(e) of the Bankruptcy Act (11 U.S.C. §107) by purportedly alleging a fraudulent conveyance of the property of the bankrupt plaintiff, and with respect to Count 3, by virtue of the Court's pendant jurisdiction, under 28 U.S.C. §1331."

The plaintiff filed his complaint in 1970, setting out the circumstances of the transfer of the assets of the D.C. Sullivan Company. He alleged in Count I that said transfer constituted a fraudulent conveyance without consideration under §67d(2)(a) of the Bank-

ruptcy Act, and in Count II that said transfer was made with the actual intent to hinder, delay, or defraud the creditors of the company. Count III alleged the state claim of breach of fiduciary duties by defendants Sullivan and Otte, officers and directors of the company, for permitting and cooperating with the other defendants to whom the assets were transferred. The District Court's assumption of jurisdiction properly was decided based on the pleadings. See Jackson v. Stinchcomb, 635 F.2d 462, 471 (5th Cir. 1981). The fact that the federal claims against Sullivan were subsequently determined to be non-meritorious--the jury found for the defendants (Sullivan included) on Count II in 1980, and the Court of Appeals reversed the judgment against Sullivan on Count I in 1982--does not entitle the petitioner at this late date to a writ of certiorari to review the judgment of the Court of Appeals on the pendent jurisdiction issue. It was

not reversible error for the lower court to refuse to vacate the judgment on the state fiduciary duty claim that had already been decided on its merits. See State of Arizona v. Cook Paint and Varnish Co., 541 F.2d 226 (9th Cir. 1976).

In Gibbs, supra, the respondent brought parallel federal statutory and Tennessee common law claims in federal court against the United Mine Workers, arising out of alleged concerted union efforts to deprive him of contractual and employment relationships with the owners of a coal mine. Although the federal claim was ultimately dismissed after trial, and diversity was absent, this court found no error in the District Court's retention of jurisdiction over the state claim, despite its reversal on the merits of that claim. The court in Gibbs established that it is within the sound discretion of the District Court to exercise jurisdiction over

state law claims which are pendent to claims arising under federal law, where the claims "derive from a common nucleus of operative fact" or the plaintiff "ordinarily [would] be expected to try [the claims] all in one judicial proceeding." This power is to be exercised where warranted by "considerations of judicial economy, convenience and fairness to litigants." Id. at 725-726.

The Trustee maintains that the instant case fits precisely within the guidelines established in Gibbs. Surely the petitioner cannot dispute that the state law claim here was based on the same facts and evidence as the bankruptcy claims. It thus met the Gibbs standards, as the factual relationship between the federal claim and the state claim "permits the conclusion that the entire action before the court comprises but one constitutional 'case'." Id. at 725. Petitioner, however, takes issue here with the Gibbs requirement that the federal claim have substance

sufficient to confer subject matter jurisdiction on the court. In doing so, he wrongly characterizes the court's assumption of jurisdiction in this case as an unwarranted extension of the nascent concept of pendent party jurisdiction as rejected in Aldinger v. Howard, 427 U.S. 1 (1976). As will be demonstrated, however, even if the petitioner is correct that this case is analogous to the situation in Aldinger, the lower court's refusal to overturn the district court's assumption of jurisdiction was perfectly proper.

Implicit in the traditional concept of pendent jurisdiction is that the court already has jurisdiction over all the parties involved; where, for instance, a substantial federal claim has been asserted against the defendant. Throughout the entire procedural history of the instant litigation--from its inception until the post-trial stage--the district court and the parties assumed that

jurisdiction over all of the claims against the petitioner properly lay in that court because of allegations against him under the Bankruptcy Act. See Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977). Gibbs and its progeny make it clear that federal jurisdiction to try a pendent claim exists, even if the federal claim is ultimately dismissed, if the federal claim is "not insubstantial." In such a situation, the pendent jurisdiction survives the dismissal of the claim to which it appends. Ferguson v. Flying Tiger Line, Inc., 688 F.2d 1320, 1321, n. 1 (9th Cir. 1982); Rieser v. District of Columbia, supra, at 473. Under the substantiality test, "if there is any foundation of plausibility to the claim federal jurisdiction exists." O'Brien v. Continental Illinois National Bank and Trust Company of Chicago, 593 F.2d 54, 63 (7th Cir. 1979), citing 13 Wright & Miller, Federal Practice and Procedure, §3564 (1975). The question for jurisdictional purposes is "not whether the claims are without

merit but whether 'prior decisions inescapably render the claims frivolous'." Jackson v. Stinchcomb, 635 F.2d 462, 471 (5th Cir. 1981), quoting Hagans v. Lavine, 415 U.S. 528 (1974) (claims not so obviously implausible as to be completely devoid of merit). Hagans itself makes it clear that previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for jurisdictional purposes, citing Bell v. Hood, 327 U.S. 678, 682 (1946) for the proposition that:

"Jurisdiction...is not defeated...by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover...If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."

Similarly, the Court of Appeals in this case did not view its reversal of the judgment against petitioner on Count I

under the Bankruptcy Act to be inconsistent with its determination on Sullivan's petition for rehearing that the district court properly had assumed jurisdiction over the pendent state claim. Furthermore, petitioner's argument that because the lower court deemed the issue of recovery under the Bankruptcy Act against someone such as the defendant who did not receive the fraudulent transfer of property, to be an "open and shut question of law", does not significantly aid the petitioner, especially under the foregoing Bell v. Hood analysis. Indeed, it was not until the Trustee was preparing his brief on appeal, and in response to Sullivan's argument that he was entitled to a judgment n.o.v. on both the bankruptcy count and the pendent claim for evidentiary reasons, the Trustee found and cited the case of Elliott v. Glushon, 390 F.2d 514 (9th Cir. 1967), that that authority

ever arose in this litigation. In his brief the Trustee pointed out that Elliott itself had noted a "conflict of authority" on the subject of recovery under §67d of the Bankruptcy Act, and that the Elliott court had followed one line of cases and held that the "recipients" of the fraudulently transferred property were the only parties liable to the trustee. The Trustee cited what he believed to be the more equitable line of cases based on the policy of joint tortfeasor liability, represented by Brainard v. Cohn, 8 F.2d 13 (9th Cir. 1925) and Inland Security Company, Inc. v. Estate of Kirshner, 382 F.Supp. 338 (W.D. Mo. 1974), which closely approximated the breach of fiduciary theory under the pendent claim. The fact that the lower court was more convinced by Elliott v. Glushon, supra, than by the other cases which foresaw liability on the part of a party such as Sullivan does not mean that

the Trustee's claim under the Bankruptcy Act was so completely frivolous as to render it insubstantial for jurisdictional purposes under the Hagans v. Lavine analysis, supra¹. Moreover, an important factor in the court's reasoning in Elliott, supra, was the possibility, that "the trustee may still have a right of action for fraud or deceit under state law against those who participated in the transaction", as the Court of Appeals noted in its opinion below (Petitioner's Supplementary

¹Contrary to the petitioner's assertion, therefore, this is not a case where the Trustee's claims under §67d of the Bankruptcy Act were "facially defective." In this way it is distinguishable from Aldinger v. Howard, 427 U.S. 1 (1976), wherein the party was absolutely prohibited from being in federal court because 42 U.S.C. §1983 on its face (at that time) excluded suits against a "county." Former §67d of the Bankruptcy Act, upon which jurisdiction was based here, provided only that a transaction found to be fraudulent shall be "null and void against the trustee...." 11 U.S.C. §107(d)(6).

Appendix at 3a). Undoubtedly implicit in that court's refusal to upset pendent jurisdiction here was the recognition that such a right of action no longer exists in this case, almost thirteen years after the events which formed the basis of this suit. See O'Brien v. Continental Illinois National Bank and Trust Company of Chicago, supra, (Pendent state law claim should be retained when there is a substantial possibility that a subsequent state court suit on the claim may be time-barred).

Indeed, the policy reasons for refusing to issue a writ of certiorari override any question of the substantiality of the federal claim here. This is obviously not a case in which the court reached out to decide a state law issue after dismissing the federal claim. See State of Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir. 1976). Thus, even if this court were to decide that there was no independent basis

of federal jurisdiction over petitioner Sullivan because of insubstantiality, and therefore this case in essence involves pending another party onto the federal action, the lower court's decision should not be disturbed. Numerous cases since Gibbs, supra, have extended that opinion's reasoning to pendent jurisdiction over state law claims against defendants over whom there is no independent basis of federal jurisdiction, if the claims arose out of the same nucleus of operative fact as the federal claims applicable to another defendant. See, e.g., Transok Pipeline Co. v. Darks, 565 F.2d 1150 (10th Cir. 1977); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), cert. denied, 416 U.S. 996 (1974); Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. denied, 405 U.S. 944 (1971). These cases are instructive here.

In Aldinger v. Howard, 427 U.S. 1 (1976), heavily relied upon by petitioner, this court discussed the subject of pendent

party jurisdiction in the context of an action alleging civil rights violations under 42 U.S.C. §1983. A county employee had sued her supervisor, the commissioners and the county itself, maintaining that the district court had pendent jurisdiction over the county which was not suable as a "person" under §1983. Noting that the issue had arisen at the pleading stage, the court disapproved of adding a completely new party over whom the district court had no power under the Civil Rights Act, viewing that as an unwarranted extension of the pendent jurisdiction doctrine. The court reasoned that the plaintiff in such a situation sought to use the Gibbs Court's definition of the scope of a "case" so as to bring into federal court a party whom Congress never intended to be there. The court stated:

"Before it can be concluded that [pendent party] jurisdiction exists,

a federal court must satisfy itself not only that Article III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."

Id. at 18.

Since federal jurisdiction in Aldinger was based on 28 U.S.C. §1343(3), the jurisdictional counterpart of 42 U.S.C. §1983, and because previous Supreme Court decisions established that Congress did not intend municipal corporations to be suable in federal court under those statutes, the Aldinger court held that there was no pendent jurisdiction of plaintiff's claim against the county. In doing so, the Court carefully limited its holding, with language which is of instant relevance:

"[W]e decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §§1343(3) and 1983. Other statutory grants and other alignments of parties and claims might call for a different result. When the

grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. §1346, the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal court may all of the claims be tried together." Id. (emphasis in original).

These qualifying statements shed much light on the instant situation. The district court is granted exclusive jurisdiction over this bankruptcy action pursuant to 28 U.S.C. §1334. Nothing in 28 U.S.C. §1331, authorizing general federal question jurisdiction, and upon which the district court based its assumption of pendent jurisdiction would seem to preclude the court's exercise of jurisdiction over Count III here. Aldinger expressly declined to decide whether pendent party jurisdiction could be supported under §1331, but at least one lower court has found since then that §1331 supports the exercise of pendent party jurisdiction. See State of

North Dakota v. Merchants National Bank & Trust Co., 634 F.2d 368 (8th Cir. 1980).

Moreover, despite the court's interpretation of §67d of the Bankruptcy Act in Elliott v. Glushon, supra, that statute cannot be read as a Congressional directive that its purpose would be circumvented if pendent jurisdiction were allowed in a case such as this. The state claim here was in a true sense ancillary to and dependent on the federal claims, and the trustee's rights would be lost if the pendent jurisdiction were held improper.

Similarly, the principles expressed in Aldinger, supra, indicate the insubstantiality of several of the petitioner's purported justifications for the allowance of the writ. Petitioner argues that the lower court's decision creates conflict in the circuits on this issue and that it will upset the distribution of power between the federal government and the states in light of the Article III parameters on federal jurisdiction.

Firstly, no substantial conflict exists necessitating a new Supreme Court opinion on pendent (party) jurisdiction based on this case. As the Court makes clear in Aldinger, the issue is "subtle and complex", and "it would be unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction." Id. at 18. The court's very statement that "[o]ther statutory grants and other alignments of parties" may call for a different result was a recognition of the overwhelming importance of the particular facts of each case in the resolution of the jurisdictional issue. Thus, the specific conflict that petitioner cites between Transok Pipeline Co. v. Darks, 565 F.2d 1150 (10th Cir. 1977) and Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977), is of minimal significance. The instant case is factually analogous to Transok, in which the court affirmed the exercise of pendent party

jurisdiction, relying on the test enunciated in Aldinger, supra, in a situation where there was exclusive jurisdiction in federal court to try the particular claim against the principal party (under 25 U.S.C. §357) so that there could be a trial of all the claims only in federal court. As the court noted in Transok, supra, the narrow approach utilized by the Ninth Circuit in Ayala, supra, "is not justified from a reading of Aldinger, which can be read to indicate that there is power to exercise pendent party jurisdiction unless Congress has expressly or impliedly negated such power in a particular jurisdictional context." Transok Pipeline Co v. Darks, 565 F.2d at 1155. Moreover, as the cases cited throughout this brief indicate, the majority of jurisdictions would utilize a more liberal approach in the context of a suit such as the instant one.

In addition, Article III presents no obstacle to the adjudication

of the pendent state claim here. The Aldinger court, while focusing almost exclusively on the legislative intent of the particular jurisdictional statute, appeared to conclude that the "general contours" of Article III posed no problem in that case. It noted the Gibbs court's flexibility within the parameters of Article III, which indicated that "in treating litigation where nonfederal questions or claims were bound up with the federal claim upon which the parties were already in federal court, this Court has found nothing in Article III's grant of judicial power which prevented adjudication of the nonfederal portions of the parties' dispute." Aldinger v. Howard, 427 U.S. at 9.

The Trustee maintains that the instant case is much more akin conceptually to the type of situation contemplated by the Court in Gibbs, supra, wherein the parties were already present in federal court, and despite the dismissal of the federal claim, the court

could retain jurisdiction over the pendent state claim which arose out of the same facts. The lower court's decision does not represent an unwarranted expansion of pendent party jurisdiction as cautioned against in Aldinger, supra. In Aldinger, the court stated that "the extension of Gibbs to this kind of pendent party jurisdiction--bringing in an additional defendant at the behest of the plaintiff--presents rather different statutory jurisdictional considerations", in light of "[p]etitioner's contention that she should be entitled to sue Spokane County as a new third party, and then to try a wholly state-law claim against the county, all of which would be 'pendent' to her federal claim against respondent county treasurer...." Aldinger v. Howard, 427 U.S. at 15. Sullivan really cannot be considered that type of "new" party, and this case is missing the element of "subterfuge" implied in that case. The Trustee, and all of the other parties, for that matter, assumed in good faith for twelve years that Sullivan was properly subject to

the court's jurisdiction under the Bankruptcy Act. Even if that jurisdictional basis is regarded as based on an "insubstantial federal claim", so that Sullivan is a pendent party over whom no independent basis of jurisdiction exists, Aldinger and other cited cases provide support for the Trustee's position here, as the foregoing analysis illustrates.

Finally, the foregoing analysis is aided by the most compelling reason for refusing to grant the petitioner's writ here--the fact that the entire case has already been tried on the merits, and inordinate amounts of time and energy have been spent on this litigation. The courts are in unanimous agreement that in a situation such as this, "considerations of judicial economy, convenience and fairness to litigants" favor the retention of jurisdiction over state law issues, where both state and federal claims were tried together and the latter only dismissed after trial. See

Lentino v. Fringe Employment Plans, Inc., 611 F.2d 474 (3d Cir. 1979); Transok Pipeline Co. v. Darks 565 F.2d 1150 (10th Cir. 1977); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Forest Laboratories, Inc. v. Pillsbury Company, 452 F.2d 621 (7th Cir. 1971). This is especially true in view of the fact that the particular jurisdictional objection was raised for the first time on appeal. Id. at 629, citing Rosado v. Wyman, 397 U.S. 397 (1970). Thus, the lower court properly noted that Sullivan had not raised the related issue of the receipt of fraudulently transferred property before his Petition for Rehearing (Petitioner's Supplementary Appendix at 11a). Cf. In re Union National Bank & Trust Co. of Souderton, Pa., 298 F.Supp. 422 (E.D. Pa. 1969) (an action under state law for mishandling fiduciary accounts was retained after dismissal of claim that accounts were bankruptcy accounts under the Bankruptcy Act). In

light of this well-established and practical policy, the Court of Appeals did not err in concluding that the district court's assumption of jurisdiction of the pendent state claim should not be disturbed, and additional elaboration on its part was not necessary.

C O N C L U S I O N

For these reasons, the petition for a writ of certiorari should be denied.

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